Mohd Asmadi bin Yusof v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–77 OF 2008 (T)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), MOHD GHAZALI AND HELILIAH FCJJ
24 AUGUST 2010

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Criminal Law — Penal Code — s 302 — Murder — Appeal against conviction — Accused hitting deceased on his head with brick — Whether accused had intention to kill or cause bodily injury sufficient to cause death of deceased — Whether ingredients of murder proven — Whether prosecution case established beyond reasonable doubt — Penal Code ss 300(a), (c), (d) & 302

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The appellant was convicted for the murder of one Aswadi ('the deceased') and was sentenced to death in accordance with s 302 of the Penal Code ('the Code'). The offence was committed on 2 September 2000 at a night market in Marang Kuala Terengganu. On the night of the incident, the deceased and his brother PW4 visited a stall selling compact discs which was operated by PW2 and his wife, PW3. PW2 and PW3 saw the appellant hitting the deceased on his head with a brick. When the deceased fell to the ground the appellant continued attacking the deceased with his hands and legs. The appellant then ran away. The deceased succumbed to his injuries and died. The appellant testified that on the day of the incident he was in Mersing. He denied being at the scene of the incident and denied assaulting the deceased. He claimed that he was informed by his brother that the police was looking for him and therefore had surrendered himself to the police. The trial judge held that the prosecution had proved its case beyond reasonable doubt and found the appellant guilty of the offence of murder. The Court of Appeal dismissed the appellant's appeal. Hence this appeal by the appellant. The appellant claimed that no prima facie case had been made out under s 302 of the Code as per the charge and that the facts showed that it was more a case of an offence under s 304 of the Code, viz, culpable homicide not amounting to murder.

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Held, dismissing the appeal:

(1) The appellant was charged with murder and hence the prosecution had to prove the following ingredients: (i) that the death of the deceased had taken place; (ii) that his death had been caused by or in consequence of the act of the appellant; and (iii) such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused his death (see para 14).

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(2) The totality of the evidence pointed conclusively to the guilt of the appellant. All the ingredients had been proved. The learned trial judge had religiously followed what was required of him pursuant to ss 180 and 182A of the Criminal Procedure Code when he called upon the appellant to enter on his defence. At the conclusion of the trial, the evidence in its totality confirmed in material particulars that it was the appellant who murdered the deceased (see paras 15 & 17).

(3) The appellant was conscious of what he was doing when he used the brick to hit the head of the deceased. His conduct showed that it was done with absolute callousness towards the result. When a brick or any hard object is used to hit the head of a person, it amounts to an act which is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. After the deceased fell to the ground, the appellant assaulted him by using his hands and leg (see para 20).

(4) It was established beyond reasonable doubt that the appellant caused the death of the deceased. In arriving at that decision the trial judge had extensively and correctly appraised the law (see para 24).

[Bahasa Malaysia summary

Perayu telah disabitkan dengan pembunuhan Aswadi ('si mati') dan telah dihukum mati menurut s 302 Kanun Keseksaan ('Kanun'). Kesalahan tersebut telah dilakukan pada 2 September 2000 di pasar malam Marang Kuala Terengganu. Pada malam kejadian tersebut, si mati dan abangnya PW4 telah melawat sebuah kedai menjual cakera padat yang dijalankan oleh PW2 dan isterinya, PW3. PW2 dan PW3 melihat perayu memukul si mati di kepala dengan batu-bata. Apabila si mati jatuh ke tanah, perayu selanjutnya menyerang si mati menggunakan tangan dan kakinya. Perayu kemudian melarikan diri. Akibat kecederaan yang dialaminya, si mati telah meninggal dunia. Perayu memberi keterangan bahawa pada hari kejadian tersebut, dia berada di Mersing. Dia menafikan dia berada di tempat kejadian dan telah menyerang si mati. Dia mandakwa bahawa dia telah diberitahu oleh abangnya bahawa polis sedang mencarinya dan oleh itu telah menyerahkan diri kepada polis. Hakim bicara memutuskan pihak pendakwaan telah membuktikan kes melampaui keraguan munasabah dan perayu didapati bersalah atas kesalahan membunuh. Mahkamah Rayuan menolak rayuan perayu. Justeru, rayuan ini oleh perayu. Perayu mendakwa bahawa tiada kes prima facie yang dibuktikan di bawah s 302 Kanun bagi setiap tuduhan dan bahawa fakta menunjukkan bahawa ia adalah lebih kepada kes bagi kesalahan di bawah s 304 Kanun iaitu homisid salah yang tidak terjumlah kepada kesalahan membunuh.

Diputuskan, menolak rayuan:

(1) Perayu telah dituduh dengan membunuh dan oleh itu, pihak

pendakwaan hendaklah membuktikan faktor-faktor berikut: (i) bahawa kematian si mati telah berlaku; (ii) bahawa kematiannya disebabkan oleh atau berikutan tindakan perayu; dan (iii) tindakan tersebut dilakukan dengan niat sama ada untuk menyebabkan kematian atau kecederaan kepada badan yang mencukupi dalam sifat sebab biasa untuk menyebabkan kematiannya (lihat perenggan 14).

(2) Seluruh keterangan secara konklusif menunjukkan kepada kesalahan perayu. Kesemua faktor-faktor telah dibuktikan. Hakim bicara yang bijaksana dengan ketat telah mematuhi apa yang diperlukan daripadanya menurut ss 180 dan 182A Kanun Prosedur Jenayah apabila dia telah memanggil perayu untuk memasukkan pembelaannya. Semasa penutup perbicaraan tersebut, keterangan secara keseluruhan mengesahkan, atas butiran material, bahawa perayu yang telah membunuh si mati (lihat perenggan 15 & 17).

(3) Perayu sedar apa yang dilakukan olehnya apabila dia menggunakan batu-bata tersebut untuk memukul kepala si mati. Tindakannya menunjukkan bahawa ianya telah dilakukan tanpa sebarang perasaan terhadap akibatnya. Apabila batu-bata atau mana-mana objek keras digunakan untuk memukul kepala seseorang, ia menjadi suatu tindakan yang sangat berbahaya yang akan menyebabkan kematian atau kecederaan badan tersebut yang akan menyebabkan kematian. Setelah si mati jatuh ke tanah, perayu telah menyerangnya menggunakan tangan dan kakinya (lihat perenggan 20).

(4) Adalah dibuktikan melampaui keraguan munasabah bahawa perayu telah menyebabkan kematian si mati. Dalam mencapai keputusan tersebut, hakim bicara telah menilai undang-undang dengan terperinci dan betul (lihat perenggan 24).]

Notes

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Chor Shuh v PP [2003] 2 MLJ 26; [2003] 1 AMR 748, CA (refd)
Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130, FC (refd)
Ong Ah Too v Regina [1955] MLJ 247 (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
Santosh v The State of Madhya Pradesh (1975) Cri LJ 602 (refd)
Vasan Singh v PP [1988] 3 MLJ 412, SC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 182A, 402A(1)
Penal Code [IND] s 300
Penal Code ss 299, 300, 300(a), (b), (c), (d), 302, 304

Appeal from: Criminal Appeal No T 05–45 of 2002 (Court of Appeal, Putrajaya)

Zamani Ibrahim (Zamani Ibrahim) for the appellant.
Saiful Edris Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Ghazali FCJ (delivering judgment of the court):

[1] The appellant was convicted for the murder of one Aswadi bin Mohamad ('the deceased') and was sentenced to death in accordance with s 302 of the Penal Code ('the Code'). The appellant appealed against his conviction to the Court of Appeal. In a unanimous decision, the appeal was dismissed and the conviction affirmed. The appellant's appeal to this court was also dismissed and the conviction affirmed.

THE FACTS

[2] The offence was committed on 2 September 2000 at about 8pm at a night market in Pekan Merchang, Marang Kuala Terengganu. The facts showed that on the night of the incident the deceased and his brother PW4 visited a stall selling compact discs which was operated by PW2 and his wife, PW3. PW2 and PW3 then saw the appellant hitting the deceased on his head with a brick. When the deceased fell to the ground the appellant continued attacking the deceased with his hands and legs. The appellant then ran away. PW4, who knew the appellant, also witnessed the incident.

[3] The deceased was then taken to the Terengganu Hospital for treatment. PW16, the doctor who treated the deceased testified that the deceased was in a coma when he was brought in and that an x-ray of the head revealed a fracture of the right temporal bone. He further testified that the deceased was in a critical condition at that material time and opined that he had a slim chance of survival. The deceased succumbed to his injuries and died on 6 September 2000.

[4] PW5, the pathologist who performed a post mortem on the deceased confirmed that the cause of death was due to severe head injuries resulting from being struck hard on the head by a blunt object.

[5] On 10 September 2000 at about 9.15pm the appellant surrendered himself at the Merchang police station. He was subsequently charged with the offence of murder.

THE HIGH COURT

[6] At the conclusion of the case for the prosecution, the learned trial judge, Nik Hashim Ab Rahman J (as he then was) ruled that the prosecution has made out a prima facie case against the appellant on the offence charged and consequently called upon the appellant to enter on his defence. In his grounds of judgment, the trial judge said:

> Keterangan yang ada pada peringkat ini adalah sudah memadai dan saya berpuashati bahawa pihak pendakwa telah berjaya mewujudkan suatu kes prima facie terhadap OKT bahawa OKT telah melakukan kesalahan membunuh ke atas si mati seperti ditakrifkan di bawah s 300(a), (c) dan (d) KK. Oleh itu, OKT dipanggil untuk membela diri.

[7] The appellant elected to give evidence on oath. He testified that on the day of the incident, ie 2 September 2000 he was in Mersing. He claimed that he was not aware that the deceased was assaulted on the day of the incident and neither would he know the assailant. He denied that he was at the scene on the day of the incident. He further denied that he was the person who assaulted the deceased on the day of the incident. He insisted that he only came to know of the incident when his brother, Mohd Noor bin Yusof contacted him by telephone and informed that the police was looking for him. Acting on that information, he returned to Merchang and surrendered to the police on 10 September 2000.

[8] Under cross-examination, the appellant identified the deceased from a photograph shown to him by the prosecuting officer. He admitted that he had in the past once quarreled with the deceased over a purchase of drugs and in the course of that quarrel the deceased attacked him with a *golok*.

[9] At the conclusion of the trial, after considering all the evidence before him, the trial judge found that the prosecution has proved its case beyond reasonable doubt and consequently found the appellant guilty of the offence of murder as charged and convicted him.

[10] In his grounds of judgment the trial judge took into consideration that no notice of alibi was given pursuant to s 402A(1) of the Criminal Procedure Code ('CPC'). In relation to this he referred to *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412. He also referred to *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324 where the accused's defence was one of denial. In *Ling Tee Huah* the

court held that a mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient. The appellant appealed to the Court of Appeal.

THE COURT OF APPEAL

[11] In dismissing the appeal, the Court of Appeal was satisfied that the trial judge had undertaken a maximum evaluation of the evidence adduced at the conclusion of the case for the prosecution and had applied the right principles when he ruled that the prosecution has made out a prima facie case against the appellant on the offence charged.

[12] On the defence of alibi proferred during the defence case, the Court of Appeal was of the view that the trial judge 'correctly came to the conclusion that there was no supporting evidence on the accused's alibi defence' and further that 'the failure to give such notice under s 402A(1) of the CPC would render the evidence in support to be inadmissible'. The appellant appealed to this court.

THE APPEAL BEFORE THIS COURT

[13] Before this court, learned counsel for the appellant raised only one point. He argued that no prima facie case had been made against the appellant under s 302 of the Code as per charge and that the facts showed that it was more a case of an offence under s 304 of the Code, viz, culpable homicide not amounting to murder.

JUDGMENT OF THIS COURT

[14] The appellant was charged with murder and hence the prosecution must prove the following ingredients:

(a) that the death of the deceased, Aswadi bin Mohamad had taken place;

(b) that his death had been caused by or in consequence of the act of the appellant; and

(c) such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused his death.

[15] We were of the unanimous view that the totality of the evidence pointed conclusively to the guilt of the appellant. All the ingredients have been proved. In his grounds of judgment the trial judge, after laying down the evidence of the various witnesses in detail and highlighting his perception of the facts

before him, found that a prima facie case has been made out against the appellant on the offence charged, ie, murder under s 302 of the Code and hence called upon the appellant to enter on his defence.

[16] The appellant elected to give evidence on oath. At the conclusion of the trial the trial judge found that the prosecution has proved its case beyond reasonable doubt and found the appellant guilty of the offence of murder as charged and convicted him.

[17] After a careful perusal of the appeal record and the trial judge's grounds of judgment we cannot see any merits in this appeal. The learned trial judge has religiously followed what was required of him pursuant to ss 180 and 182A of the CPC when he called upon the appellant to enter on his defence (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 at pp 99–100 (CLJ)). At the conclusion of the trial, the evidence in its totality confirmed in material particulars that it was the appellant who murdered the deceased.

[18] As discussed earlier, counsel for the appellant raised only one issue, viz, that no prima facie case had been made against the appellant under s 302 of the Code as per charge and that the facts showed that it was more a case of an offence under s 304 of the Code, viz, culpable homicide not amounting to murder. We cannot see how that could be possible premissed on the facts and evidence adduced by the prosecution.

[19] At the conclusion of the case for the prosecution, the trial judge found that the prosecution had made out a prima facie case of murder as defined under s 300(a), (c) and (d) of the Code and hence called upon the appellant to enter on his defence. Section 300 of the Code reads:

> Except in the cases hereinafter excepted, *culpable homicide is murder* —
>
> (a) if the act by which the death is caused is done with the *intention* of causing;
>
> (b) if it is done with the *intention* of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the *intention* of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act *knows* that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid. (Emphasis added)

[20] The facts showed that the appellant was conscious of what he was doing when he used the brick to hit the head of the deceased. His conduct showed that it was done with absolute callousness towards the result. We are of the view that when a brick or any hard object is used to hit the head of a person, there is a strong probability that it will cause death or such bodily injury as is likely to cause death. It is an evident risk to human life. It amounts to an act which is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. The evidence also showed that after the deceased fell to the ground upon being hit on the head by the brick, the appellant assaulted him by using his hands and leg. We would think that the whole act was wholly inexcusable.

[21] Section 299 of the Code defines culpable homicide and it reads:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits an offence of culpable homicide.

Clauses (a), (b) and (c) of s 300 of the Code contemplate 'intention' and in cl (a) it is intention to cause death while in cll (b) and (c) it is intention to cause bodily injury. On the other hand, 'intention' is not a necessary element in cl (d) and all that is required to be proved is knowledge that the act is likely to cause death. In *Santosh v The State of Madhya Pradesh* (1975) Cri LJ 602, in dealing with s 300 of the Indian Penal Code, Beg J held (at p 603) as follows:

> An intention to kill is not required in every case. A knowledge that the natural and probable consequences of an act would be death will suffice for a conviction under s 302 of the IPC.

(see also *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130).

[22] Section 180 of the CPC provides that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused and if the court finds a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence. Looking at the facts of the instant appeal, we cannot see how the trial judge could have ruled otherwise. Consequently, s 182A of the CPC provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. In the instant appeal the trial judge ruled at the conclusion of the trial that the prosecution has proved its case beyond reasonable doubt. It is our view that he has made the correct decision under the circumstance of this case. The defence was one of denial. There was no other proof to reasonably dislodge the prosecution's evidence.

[23] In *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26; [2003] 1 AMR 748 this court held that the law requires the trial judge to consider all the evidence that has been adduced in support of the defence and that a court must consider carefully whether a defence put forward is capable of raising a reasonable doubt in the prosecution's case. In the instant appeal, the trial judge has done that and as such we find no reason to disturb his finding. We are aware that it is a salutary rule of law that the failure to consider a possible legal defence is a miscarriage of justice (see *Ong Ah Too v Regina* [1955] MLJ 247). In the instant appeal, we cannot see any possibility that that there was a miscarriage of justice.

[24] On the whole, we were of the view that the trial judge was correct in finding the appellant guilty of murder. It was established beyond reasonable doubt that the appellant caused the death of the deceased. In arriving at that decision the trial judge had extensively and correctly appraised the law. All the evidence proved beyond doubt that the appellant had performed the act knowingly and voluntarily. It is for these reasons that we dismissed the appeal and affirmed the conviction and sentence.

Appeal dismissed.

Reported by Kanesh Sundrum